

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-149

CIKEITHIA SELLERS,
Claimant-Petitioner,

v.

Washington Metropolitan Area Transit Authority,
Employer-Respondent.

Appeal from an August 17, 2015 Compensation Order by
Administrative Law Judge Mark W. Bertram
AHD No. 12-522A, OWC Nos. 703835, 692386, 689318, 671590, and 658231

(Decided February 12, 2016)

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 FEB 12 PM 10 16

Krista N. DeSmyter for Claimant¹
Mark H. Dho for Employer

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE and LINDA F. JORY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This appeal is from a Compensation Order issued August 17, 2015 (CO), and is a consolidation of multiple claims brought by Cikeithia Sellers (Claimant) in a single formal hearing for injuries alleged to have been sustained while she was employed as a bus driver for 11 years, and a rail station manager for 3 years. In each case Claimant sought awards for permanent partial disability under the schedule to various parts of her body.

A formal hearing on these claims was conducted on June 11, 2015 before an administrative law judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment

¹ Petitioner was represented by Matthew Peffer at the formal hearing.

Services (DOES). The parties stipulated concerning the claims heard by the ALJ on that date as follows:

<u>Date of Injury</u>	<u>OWC No.</u>	<u>Body Part(s)</u>	<u>Average Weekly Wage</u>
1. 3/03/2009	658231	low back, both legs, both shoulder, left wrist	\$1,269.93
2. 5/28/2010	671590	neck, back, left wrist/hand, right wrist, right knee	\$1,427.67
3. 2/09/2012	689318	low back	\$1,624.77
4. 4/12/2012	692386	low back, left leg, left foot	\$1,624.77
5. 4/19/2013	703835	back, right leg, left leg	\$1,193.44

Stipulation Form and Joint Prehearing Statement (JPHS), *passim*; *see also*, CO at 2.

In the August 17, 2015 CO, the ALJ concluded “Claimant’s accidental injuries arose out of and in the course of her employment and are medically causally related to her work place accidents/injuries” and made awards of 0% permanent partial disability for the arms, 15% permanent partial disability to the left leg, and 5% permanent partial disability to the right leg. CO at 12.

On September 16, 2015, Claimant filed Claimant’s Application for Review and memorandum of points and authorities in support thereof (Claimant’s Brief) with the Compensation Review Board (CRB) seeking a remand to AHD with instructions to the ALJ to further consider all the awards.

On October 2, 2015, Employer filed Employer’s Opposition to Claimant’s Application for Review and a memorandum of points and authorities in support thereof (Employer’s Brief), seeking an affirmance of the CO by the CRB. Employer did not file a cross-appeal contesting the awards that were made or the findings and conclusions that all the complained-of injuries arose out of and occurred in the course of Claimant’s employment or that they are medically causally related to the stipulated work injuries.

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers’ Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). “Substantial evidence”, as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is bound to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant's first argument is framed as follows:

The Compensation Order erred as a matter of law in denying Ms. Sellers' claim for permanent partial disability for her Right and Left Arms for reasons that do not rationally flow from its determination on causal relationship of the arms.

Claimant's Brief at 3, "ARGUMENT A."

The basis of this argument is that:

Specifically, the Compensation Order rejects Dr. Michael Franchetti's opinion as to the nature and extent of Ms. Sellers' impairment based on issues pertinent to causal relationship. Specifically, the Compensation Order states, "I do note that with regards to the EMG studies, the study results with regards to the cervical area were at a time Claimant was suffering from chronic cervical issues unrelated to her work place injuries." CO at 10. Further, it rejects Dr. Franchetti's rating for not addressing "Claimant's pre-existing cervical issues." *Id.* These do not serve as valid bases for rejecting the opinion of Dr. Franchetti or in wholly discounting Ms. Sellers' demonstration of disability to the arms because its reasoning conflicts with the determination that her arm conditions are legally and medically causally related to her work injuries.

Claimant's Brief at 4.

Employer responds by arguing that the ALJ's decision is supported by substantial evidence, because:

The ALJ noted that given the complexity of the multiple work related and non-work related incident [sic] and accidents in the record, Dr. Franchetti's opinion lacks sufficient reasoning and detail. The ALJ candidly notes that,

The problem with Dr. Franchetti's upper extremity ratings is they occur in a vacuum.

Employer's Brief at 5.

This response represents Employer's interpretation of the ALJ's rationale, which Employer set forth as follows:

The medical evidence available to award any disability for Claimant's upper extremities is lacking and confused. Claimant testified that while working she functions and her neck tightens up. Her right hand swells up and she gets a frozen arm. *I do not doubt this occurs.* I also do not doubt the objective EMG findings or to a certain extent Dr. Dawson's physical examination findings. When Claimant was examined numerous times by Dr. Levitt she was found not to have cervical deficits. What is missing is sufficient credible, supporting evidence that the current upper

extremity conditions/symptoms affecting Claimant have *caused a disability within the Act*. Even Dr. Dawson's medical reports do not address previous non-work related cervical issues affecting her upper extremities and how they related or do not relate to any work limitations. While Claimant *undoubtedly has some form of cervical and therefore upper extremity symptomatology—she has not proven she has a disability within the meaning of the Act*.

Employer's Brief at 5, quoting the CO at 10 (emphasis supplied).

While we do not dispute (nor do hold) that the record contains substantial evidence to support a finding of no causal relationship regarding the arm complaints and Claimant's employment, the ALJ is wrong to state that the medical opinions cited "occur in a vacuum". To the contrary, they occur in the context of (1) the presumption under *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995) that the complained-of conditions are medically causally related to the employment; and (2) the long established "aggravation rule" in this jurisdiction, which is aptly described by the DCCA:

It is well settled that "an aggravation of a preexisting condition may constitute a compensable accidental injury under the Act." *Ferreira [v. DOES]*, 531 A.2d at 660 (quoting *Wheatley[v. Adler]*, 132 U.S. App. D.C. at 182, 407 F.2d at 312). "The fact that other, nonemployment related factors may also have contributed to, or additionally aggravated [claimant's] malady, does not affect his right to compensation under the 'aggravation rule.'" *Hensley v. Washington Metro. Area Transit Auth.*, 210 U.S. App. D.C. 151, 155, 655 F.2d 264, 268 (1981), *cert. denied*, 456 U.S. 904, 72 L. Ed. 2d 160, 102 S. Ct. 1749 (1982). "The cases almost invariably decide that the fact that the injury would not have resulted but for the pre-existing disease, or might just as well have been caused by a similar strain at home or at recreation, are both immaterial." *Id.* (quoting *Wheatley*, 132 U.S. App. D.C. at 182 n. 11, 407 F.2d at 312 n. 11). The aggravation rule is embodied in D.C. Code § 36-308 (6)(A) [now §32-1508], which provides that "if an employee receives an injury, which combined with a previous occupational or nonoccupational disability or physical impairment causes substantially greater disability or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability . . ."; *see also Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 704 A.2d 295, 297-99 (D.C. 1997) (discussing the policies underlying § 36-308 (6)); *Daniel v. District of Columbia Dep't of Employment Servs.*, 673 A.2d 205, 207-08 (D.C. 1996).

King v. DOES, 742 A.2d 460 (D.C. 1999) at 468.

The ALJ twice qualified the denial of an award to the arms with the phrase "disability within the Act" or "under the meaning of the Act". Given that the ALJ also found that he "does not doubt" that Claimant's right hand swells and right arm "freezes up" and "undoubtedly has some form of cervical and therefore upper extremity symptomatology", we can reach no other conclusion than that the denial of an award on the grounds stated by the ALJ was improperly in conflict with the factual finding of causal relationship, unchallenged in this appeal, and to which Claimant was entitled to a presumption in her favor.

We agree with Claimant that the award of 0% to the arms under the schedule does not flow rationally from the findings as set forth in the above quoted passage from the CO, and thus we reverse the implied finding of a lack of causal relationship, vacate the awards of 0%, and remand for further findings of fact and conclusions of law regarding the nature and extent of the arm disabilities, if any, under the schedule.

Claimant's second argument on appeal is framed as follows:

The Compensation Order failed to properly apply the preference for the opinion of the treating physician in its determination of the nature and extent of Ms. Sellers' permanent partial disability to her arms and to her legs.

Claimant's Brief at 4, "ARGUMENT B".

In support of this argument, Claimant asserts that by writing in a report (or more accurately, a letter to Claimant's counsel) that he, the treating physician, had reviewed the competing IMEs and that he agreed with Dr. Franchetti regarding the fact that Claimant suffers from medical impairments to her arms and legs, entitles Claimant to the benefit of the treating physician preference. Claimant's Brief at 4 – 5.

Employer counters that the letter merely agrees with the existence of medical impairments, and is irrelevant to the nature and extent of any disability resulting from those impairments. Employer's Brief at 6 – 7. Employer also complains that Dr. Franchetti's letter refers to a correspondence to the doctor from Claimant's counsel, a copy of which is not in the record, which "leads to speculation that he was provided some type of narration of the facts." *Id.*

Regarding the second point, if Employer had some objection to the admissibility of the letter on the grounds that the lack of Claimant's counsel's letter somehow rendered insufficient the foundation for its being made part of the record, the time and place for that objection was at the formal hearing, when any such foundational complaint could have been addressed. That was not done, and we reject this basis for Employer's position.

However, we accept Employer's argument that the letter does not appear to contain an *independent expression* of opinion of the treating physician concerning the *degree* of medical impairment suffered by Claimant, and it is not sufficient to bootstrap Dr. Franchetti's IME opinion to the level treating physician opinion.

Claimant raises no other objections to the awards of 15% permanent partial disability to the left leg, and 5% permanent partial disability to the right leg. Specifically, no objection is raised to the effect that the reasons for the amount of the awards were not adequately explained or that they are not supported by substantial evidence. Accordingly, we determine that the awards made to the legs are supported by substantial evidence and are in accordance with the law. *See Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

CONCLUSION AND ORDER

The basis of the award of 0% disability under the schedule to the arms is in conflict with the unappealed findings concerning medical and legal causal relationship and the principles established in *King v. DOES, supra*, and *Whittaker v. DOES, supra*. The 0% awards to the arms are vacated and the implied determination that any disability to the arms is unrelated to the work injury is reversed. The matter is remanded to AHD for further findings of fact and conclusions of law concerning the nature and extent of disability, if any, Claimant has sustained to either or both her arms.

So ordered.